No. 77-588

In the Supreme Court of the United States

OCTOBER TERM, 1977

STANLEY JERRY PIASCIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 559 F. 2d 545.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1977. A petition for rehearing was denied on September 22, 1977 (Pet. App. A). The petition for a writ of certiorari was filed on October 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction must be reversed because the court reporter, with petitioner's consent, did not record the closing arguments at trial.

2. Whether the district court's instructions to the jury improperly deprived petitioner of a defense.

3. Whether petitioner's convictions of both introducing imported merchandise into the commerce of the United States by means of a fraudulent declaration, in violation of 18 U.S.C. 542, and smuggling, in violation of 18 U.S.C. 545, violated the Double Jeopardy Clause.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of smuggling, in violation of 18 U.S.C. 545 (Count I), fraudulently introducing imported merchandise into commerce, in violation of 18 U.S.C. 542 (Count II), and transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. 2312 (Count III). He was sentenced to one year's imprisonment on each count, the sentences on Counts I and II to be served concurrently. Execution of the sentence imposed on Count III was suspended and petitioner was placed on probation for five years (Pet. App. C). The court of appeals affirmed (Pet. App. B).

The evidence at trial showed that on June 20, 1975, petitioner rented a Mercedes-Benz automobile in Stuttgart, Germany, identifying himself as Edwin Middleswart, a United States citizen whose passport petitioner previously had stolen (Tr. 6, 8-10, 30-31).[1] Three days later petitioner falsely notified the rental agency that the automobile had either been stolen or towed away in Hamburg (Tr. 34-35). On June 25, petitioner executed a fraudulent bill of sale for the car, setting forth a sale from "Gerhardt Breitkopf" to

[1]"Tr." refers to the transcript of petitioner's trial.

"Richard Meissner" (Tr. 319). Using overseas registration forms, petitioner then registered the automobile in New York in the name of Richard Meissner and placed New York license tags on the car in Europe (Tr. 125-127).[2] After composing a fictitious letter from Meissner authorizing Middleswart to drive the Mercedes-Benz (Tr. 127-128), petitioner, posing as Middleswart, drove the car to Denmark, where he arranged for its shipment to Canada (Tr. 131, 188-189).

The stolen automobile arrived in Montreal on August 24, 1975, and was transported by rail to Vancouver (Tr. 131-132, 188-189). On October 6, 1975, petitioner, again using the name Middleswart, obtained the car and cleared it through Canadian customs (Tr. 102-105, 266-267). He then drove it to the United States port of entry at Blaine, Washington, where he was asked by an immigration officer if he was returning with anything that "he had acquired outside the United States." Petitioner's response was negative (Tr. 109-111). During a thorough follow-up interview with customs officers, petitioner again stated that he had brought nothing with him from Canada and repeatedly asserted that he had acquired the automobile in New York (Tr. 112, 120-123, 163).

As Customs Inspector Donald Morrison was checking the car's engine, he noticed that it did not have an emission control sticker that was required for all automobiles imported into the United States after 1968 (Tr. 124). This led the inspector to conduct a more thorough search of the car, which produced Middleswart's passport and driver's license, the shipping papers, the registration in the name of "Richard Meissner," the false

[2]Petitioner previously had registered a different automobile in New York while overseas (Tr. 315-317).

letter of authorization, an airplane ticket in the name of Middleswart, and other incriminating materials (Tr. 124-134, 145). Petitioner was then arrested.

ARGUMENT

1. Petitioner contends (Pet. 10-14) that his conviction must be reversed because the court reporter did not record trial counsel's closing arguments, arguably in violation of 28 U.S.C. 753(b).[3] This claim was correctly rejected by the court of appeals, which concluded that, although the recording requirement of Section 753(b) is mandatory and includes within its scope the opening and closing arguments of counsel, petitioner knowingly and voluntarily accepted the trial court's suggestion to waive the recording of closing arguments in this case (Pet. App. vii to xi).[4] The court below determined that Section 753(b) was enacted primarily "to confer private rights on the parties to protect the record in the event of an appeal" (*id.* at ix-x) and accordingly that petitioner's counsel's tactical decision not to object—perhaps in the hope "that

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[3]28 U.S.C. 753(b) provides in pertinent part:

> One of the reporters appointed for each such [district] court * * * shall record verbatim * * * (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary * * *.

[4]The waiver of recording was agreed upon in the following colloquy (Pet. App. iii):

> THE COURT: * * *
>
> Now, Mr. Mair and Mr. Froelich, do you both agree to waive the reporting of your closing statements?
>
> MR. FROELICH: The defense does.
>
> MR. MAIR: I do.
>
> THE COURT: Very well.

he would have more leeway in his closing argument if it was not recorded" (*ibid.*)—constituted an effective waiver of this non-jurisdictional, statutory requirement. See *United States* v. *Sigal*, 341 F. 2d 837, 839-840 (C.A. 3), certiorari denied, 382 U.S. 811; *Addison* v. *United States*, 317 F. 2d 808, 811 (C.A. 5), certiorari denied, 376 U.S. 905.[5] The court's finding of waiver is clearly supported by the record and does not warrant further review.[6]

There also is no merit to petitioner's alternative claim that the court of appeals was compelled by its decision in *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9), to remand the case to the district court for a hearing to determine whether petitioner had been prejudiced by the failure to record. Petitioner's allegation of error related to government counsel's posing a hypothetical question during closing argument that was based upon the report of a handwriting expert that had not been admitted into evidence.[7] As the court of appeals noted, however,

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[5]In the exercise of its supervisory power, however, the court of appeals suggested that court reporters henceforth be required to record everything that transpires in open court, including counsel's closing arguments (Pet. App. xii-xiii).

[6]Petitioner's assertion (Pet. 10-11) that *United States* v. *Upshaw*, 448 F. 2d 1218 (C.A. 5), certiorari denied, 405 U.S. 934, and *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10), hold that a violation of Section 753(b) automatically requires reversal is incorrect. In each case the court of appeals held that reporting omissions require reversal only where the court is unable to determine that the alleged, unrecorded errors were harmless. See *United States* v. *Alfonso*, 552 F. 2d 605, 619-620 (C.A. 5), certiorari denied, No. 77-90, October 3, 1977.

[7]In an affidavit submitted to the court of appeals, petitioner's appellate counsel stated that he had been informed that government counsel's closing argument included the following statement (Pet. 9):

> There are a lot of fraudulent written documents which you will see among the exhibits. A handwriting expert analyzed them and compared them with the handwriting samples of the accused. I

although a failure to record counsel's closing arguments normally would require remand to the district court, in accord with *Brown*,[8] for a reconstruction of the record pursuant to Fed. R. App. P. 10(c) and a determination whether the defendant had been prejudiced by the omission, there is no need to do so where, as here, the appellate court itself can conclude with assurance that the alleged error, even if accepted as true, was harmless. See *United States* v. *Snead*, 527 F. 2d 590, 591 (C.A. 4); *United States* v. *Upshaw*, 448 F. 2d 1218, 1224 (C.A. 5), certiorari denied, 405 U.S. 934; *Parrott* v. *United States*, 314 F. 2d 46, 47 (C.A. 10).[9]

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have the expert's letter here. What does he say about the handwriting of Mr. Piascik, who claims he is innocent? . . . Well, let's do it hypothetically. What if a handwriting expert said that he cannot exclude someone as the author of some forged documents even though that someone may have made an effort to disguise his handwriting during the sample taking! But if you want to find him innocent that's your privilege.

[8]The defendant in *Brown* failed to allege any error that had occurred during government counsel's unrecorded summation, instead contending (unsuccessfully) that the failure to record itself required reversal. Accordingly, the court of appeals was unable to make an immediate determination of harmless error and remanded the case to allow the defendant an opportunity to present claims of unrecorded, prejudicial error. 314 F. 2d at 295.

[9]Petitioner's contention (Pet. 14) that government counsel's allegedly improper statement may not be considered harmless is insubstantial. Even if petitioner's counsel's affidavit is accurate, government counsel did not directly reveal the contents of the handwriting report, but only based a hypothetical question on the report's findings. Moreover, the brief remark led to an immediate objection, whch was sustained (Pet. App. xii). Finally, as the government argued in the court of appeals, defense counsel's reference to the report during closing argument invited government counsel's rebuttal. In these circumstances, there is no reason for this Court to review the court of appeals' essentially factual conclusion that the remark did not contribute to petitioner's conviction.

2. Petitioner contends (Pet. 14-15) that a jury instruction to which he did not object improperly deprived him of a valid defense to two of the charged offenses. Specifically, petitioner asserts that his convictions for smuggling and fraudulently introducing imported goods into commerce were based upon the falsity of his statement to customs officers that he had not "acquired" property abroad. He claims that this statement was not fraudulent because his response had been justified by his belief that the term "acquired" connoted permanent possession, but that this defense was removed from the jury's consideration by the trial judge's definition of "acquired" in a manner inconsistent with petitioner's understanding of the term.[10]

The short answer to petitioner's contention is that the district court's definition did not preclude the jury from finding that petitioner reasonably believed the truth of his response. The court simply defined the term as commonly used; it did not instruct the jury that petitioner had lied to immigration and customs agents. The jury remained free to conclude that petitioner's subjective understanding of the term "acquired," although inconsistent with the accepted definition of the word, justified his negative response to the agents' questions and that he therefore lacked criminal intent. The court itself later underscored this distinction when it instructed the jury that a factually incorrect statement is not "false," within the meaning of the statutes involved, unless the declarant perceived it to be untrue (Tr. 554-6).

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[10]The district court instructed the jury that "[t]he verb 'acquired' means to come into possession, control or power of disposal" (Tr. 554-5). Defense counsel did not object to this instruction (Tr. 551).

3. Finally, petitioner contends (Pet. 15-16) that the Double Jeopardy Clause bars his convictions under 18 U.S.C. 542 and 18 U.S.C. 545 for the same act or transaction.[11] Petitioner acknowledges that the standard for determining whether two crimes are separate for double jeopardy purposes is "whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304. See also *Brown* v. *Ohio*, No. 75-6933, decided June 11, 1977, slip op. 5. That test is plainly satisfied here. As the court below found (Pet. App. xv), Section 542 requires proof that the defendant made a statement that he knew to be false, an element not required by Section 545. On the other hand, Section 545, as petitioner concedes (Pet. 16), requires proof of an intent to defraud the United States (see *United States* v. *Boggus*, 411 F. 2d 110, 113 (C.A. 9), certiorari denied, 396 U.S. 919; *United States* v. *McKee*, 220 F. 2d 266, 269 (C.A. 2)), as well as proof of clandestine introduction of goods into this country, facts that need not be shown under Section 542. See *United States* v. *Riddle*, 5 Cranch 311, 312. Thus, the two statutes are not the same for purposes of the Double Jeopardy Clause.

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[11]Petitioner received identical concurrent sentences for these offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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